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Intervenor C. Prada

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LAURA HOFFMAN, an individual,
on behalf of herself and all others
similarly situated,
Plaintiff,

vs.

CITIBANK (SOUTH DAKOTA),
N.A., and DOES 1 through 10,
inclusive,
Defendants.

Case No. SACV-06-571-AJG(MLGx)

CLASS ACTION

**(1) OBJECTIONS TO FINAL
APPROVAL OF PROPOSED
SETTLEMENT BY CLASS MEMBER
C. PRADA;
(2) NOTICE OF INTENTION TO
APPEAR AT HEARING ON FINAL
APPROVAL JANUARY 31, 2011
(3) NOTICE OF INTERVENTION,**

Date: December 13, 2010

Time: 10:00 a.m.

Ctrm: 10D

Assigned to the Honorable Andrew J.
Guilford, Courtroom 10D

Action Filed: May 5, 2006

Trial Date: Not set

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1 **1. INTRODUCTION & SUMMARY OF ARGUMENT**

2 Objector C. Prada is and has been for a period within the class period the
3 holder of credit card accounts with Defendant Citibank (South Dakota), N.A
4 ("Citibank").

5 She received a sketchy notice of class membership with at least one of
6 her statements from Citibank in the Summer of 2010.

7 Ms Prada hereby respectfully objects to the proposed settlement because
8 it is not fair, reasonable and adequate for the following stated reasons.

9
10 **2. SUFFICIENT INFORMATION FOR CLASS**
11 **MEMBERS TO EVALUATE THE PROPOSED**
12 **SETTLEMENT HAS NOT BEEN PROVIDED BY**
13 **SETTLING PARTIES—SUCH INFORMATION**
14 **SHOULD BE REQUIRED**

15 It is not possible for class members to determine the value of the
16 settlement because no solid information has been provided in Settling Parties'
17 [Defendant Citibank (South Dakota), N.A. ("Citibank") and Plaintiff Hoffman
18 are the "Settling Parties"] papers in support of the proposed settlement as to,
19 inter alia, (1) the size, or even anything close to the approximate size, of the
20 class, (2) the number of overcharges made by Citibank, (3) the total amount of
21 the overcharges, or, (4) how the overcharges were made and (5) how they were
22 calculated by Citibank.

23 Indeed, the posted notice on the internet is unclear as to just how a
24 Citibank customer may determine if he or she is in the class since it appears that
25 the determinative records (if such exist for all who may be in the class) are in
26 Citibank's sole possession and control. In effect, the class definition is so
27 unclear that it appears Citibank credit card customers may be unable to
28 determine whether they have a claim or not.

1 Settling Parties should be required to provide full information on class
 2 size, damages, and who is in the class, etc. so that Citibank credit card
 3 customers will have some reasonable way to know whether the proposed
 4 settlement is in the ballpark, if they are entitled to compensation and even
 5 whether or not they are in the class.

6
 7 **3. SETTLING PARTIES AGREEMENT DOES NOT**
 8 **COMPLY WITH NEW NINTH CIRCUIT**
 9 **AUTHORITY & DOES NOT TAKE THAT**
 10 **AUTHORITY INTO ACCOUNT—DOES NOT**
 11 **PROVIDE NEEDED INFORMATION ON FEE & CY**
 12 **PRES ISSUES**

13 The Settling Parties have not complied with Federal Rule of Civil
 14 Procedure 23 as recently interpreted by the Ninth Circuit and have not complied
 15 with class members' right to due process of law.

16 They have not, inter alia, filed and made available to class members full
 17 information on Class Counsel's fee application prior to the time for filing
 18 objections.

19 " [A] schedule that requires objections to be filed
 20 before the fee motion itself is filed denies the class the full
 21 and fair opportunity to examine and oppose the motion that
 22 Rule 23(h) contemplates."

23 *In re: Mercury Interactive Corp. Securities Litigation*,
 24 618 F.3d 988 (9th Cir., Aug. 27, 2010) 2010 U.S.
 App. LEXIS 17189

25 Class Counsel's fee application must, it is submitted, be filed long before
 26 the time for objections has passed so that Class Counsel's request for 25% of ten
 27 million dollars (at present made without any documented justification) may be
 28 knowingly accepted or opposed by class members.

1 As to *cy pres*: in line with *Mercury*, supra, and as a matter of, it is
 2 submitted, just plain good practice in avoiding troublesome *cy pres* issues, the
 3 Settlement Agreements and Settling Parties failure to identify, fully (or at all)
 4 and in advance of the date for objections, the recipients of the *cy pres* funds is
 5 improper and impinges on class members due process rights.

6 The *cy pres* fund is likely to be very large; almost certainly in the
 7 millions of dollars, especially in view of the inadequate and improper notice
 8 and claims procedures discussed elsewhere in these objections.

9 Yet, Settling Parties decide, without any possible input from class
 10 members, how the *cy pres* funds will be dispensed. See Settlement Agreement,
 11 ¶ III F(5) at pages 11-12.

12 Indeed, it appears that Citibank may well intend to send the funds to
 13 some of its executives' favorite charities (probably not groups dedicated to
 14 protecting credit card users' legal rights) or to meet Citibank contribution
 15 commitments that would otherwise come out of Citibank profits thereby
 16 chopping Citibank's actual payments under the proposed settlement.

17 The Settling Parties should be required to identify where they want to
 18 direct the *cy pres* monies long before the time for objections is closed.

19 Citibank should not be permitted to use the funds for non-class purpose
 20 related groups or to meet previous contribution commitments. The funds
 21 should go to worthy groups working in the credit card consumer protection
 22 area.¹

23 24 **4. NOTICE & CLAIMS PROCEDURE INADEQUATE**

25 The notice provided the class members is also inadequate in that it fails

26
27 ¹ Among such groups might be the Consumers Union, the Consumer Federation of
 28 California, Consumer Watchdog, the Western Center on Law and Poverty, the Privacy Rights
 Clearinghouse, California and national PIRGs (Public Interest Research Groups) and the
 National Consumer Law Center.

1 to follow the rule set out by the Supreme Court.

2 “But when notice is a person's due, process which is a mere
3 gesture is not due process. **The means employed must be**
4 **such as one desirous of actually informing the absentee**
5 **might reasonably adopt** to accomplish it.”

6 *Mullane, v. Central Hanover Bank* (1950) 339 U.S. 306,
7 315; 70 S. Ct. 652; 94 L. Ed. 865 (bold added). Accord,
8 *Dusenbury v. U.S.* (2002) 534 U.S. 161, 169; 122 S. Ct. 694.

9 Here, the notice is so inadequate and the other defects in the Settling
10 Parties agreement so great that it appears there will be a tiny number of claims
11 relative to what appears to be the very large (evidently in the many millions)
12 number of class members

13 What's wrong with the Settling Parties' notice?

14 Among the numerous defects:

15 1. No way to tell if adequate notice has been given. The primary
16 claimed notice is by a miniscule statement to look online for more information,
17 hidden, at least in some cases, on a way back page at the end of a solitary
18 mailed statement. It is noteworthy that the Settlement Agreement does not
19 require the purported notice be on page one of the mailed statement, allowing
20 Citibank to bury it far back on unread pages of that statement.

21 And, since Citibank is not telling how many are in the class there is no
22 way to assess what percentage of the class got even that notice.

23 Require Citibank provide the number of class members, number of
24 accounts held by class members and the number of mailed notices sent out—
25 then it should be possible to find out what percentage of the class received the
26 mailed notice.

27 A reasonable estimate, based on the eight year class period and the
28 turnover of accounts (since Citibank did not mail notice to any class members

1 with closed accounts), might be that less than ten percent of class members got
2 the postal notice.

3 2. No email notice. Although Citibank doubtless has the email
4 addresses of many, if not almost all, of its customers, the Settlement Agreement
5 does not provide for any email notice. Email notice is very cheap and perhaps
6 more effective than regular mail notice (especially when the mail notice is not
7 sent to all class members, as here, where anyone not currently getting
8 statements from Citibank in the Summer of 2010 did not get postal notice—
9 what about notice for all the class members who had closed their accounts
10 before the Summer of 2010?)

11 3. No internet notice on Citibank websites. The Settling Parties
12 agreement specifically provides no information about the settlement will be
13 posted on its websites (such as those regularly accessed by customers using
14 online banking). Such posting would be a very inexpensive and effective way
15 to reach class members.²

16 4. Even the minimal postal mail notice sent out to some of the class
17 members in the Summer of 2010 was often "buried" in the back pages of the
18 statements.

19 5. Citibank decided how and where to place the postal notice on its
20 statement—and there was no requirement that there be a large headline on the
21 envelope or front page of the statement about the important legal notice with the
22 statement.³ Further, there was no claim form required to be printed on the

23 _____
24 ² Internet notice has generated over twenty-five times the response of traditional printed
25 published notice in a Federal class action. Comment: *Class Action Notice: The Internet's*
26 *Time Has Come* (2003) 2003 U Chi. L.F. 739, 761 and, *id.* at 772 "... a scheme of internet
notice is necessary to provide the "best practicable" notice."

27 ³ Settlement Agreement at ¶ III 3(c) at page 7:

28 "3 Statement Notice: Citibank will provide individual notice to all Persons in the
Settlement Class to whom Citibank mails or delivers a periodic statement in the month (or
billing period) in which the mailing or delivery will occur as to the particular portfolio at

1 statement—something that could have very easily and cheaply been done—if²
2 there had been a real interest in notifying class members and having them make³
3 claims.

4 6. There is no postal notice to anyone to whom Citibank did not send⁵
5 a statement in the Summer of 2010. Thus, what is evidently the largest part of⁶
6 the class got no notice. Why couldn't the many class members for whom⁷
7 Citibank has email addresses been sent full notice electronically, at a minimum?⁸
8 No reason, except an apparent desire not to inform class members.

9
10 Also, the claims procedure is needlessly costly and complex.

11 Why not provide email notice to all class members Citibank has email¹²
12 addresses for?

13 And, why not allow claims for the munificent recovery of \$18 (or less) to¹⁴
14 be made by email as well.?

15 A class members rational assessment of the postal mail claim procedure¹⁶
16 is likely to be that buying a first class stamp and filling out a form that Citibank¹⁷
17 might claim makes the class member a perjurer for a chance at \$18 (or less,¹⁸
18 perhaps much, much less) is likely to be: "don't do it." Email notice and¹⁹
19 making of claims by email would doubtless dramatically increase the number of²⁰
20 claims—as would dropping the rather silly demand that the claim form be²¹
21 signed under penalty of perjury.

22 There is no good reason not to require emailed notice and not to permit²³
23 claims to be made by email.

24
25 issue. At Citibank's sole discretion, the notice may be through a statement message
26 included on the statement, a billing insert accompanying the statement, a solo mailing
27 or a combination thereof. The Statement Notice shall direct recipients to the location of
28 the Internet Notice and Claim Form. If mailed, the Statement Notice shall be mailed to the
then-current address reflected in Citibank's computerized account records. **No skip tracing or
re-mailing of returned mail will be required".** (bold added)

1

2 **5. CITIBANK SHOULD NEITHER BE NOR CONTROL**

3 **THE SETTLEMENT ADMINISTRATOR**

4 The Settlement Agreement improperly allows Citibank to be the class

5 administrator or allows Citibank in its sole discretion to choose the settlement

6 administrator.⁴

7 Citibank, in its "sole discretion" is going to decide what claims to pay (if

8 any actually get paid under this cockamamie scheme).

9 As Professor Newberg states: usually the defendant has no responsibility

10 for distribution. Newberg on Class Actions 4th (West 2002) at § 12.23.

11 And, the Manual for Complex Litigation Fourth, § 21.612, notes Claims

12 Administrators should be determined by the Court to be disinterested and free

13 from conflicts.

14 Here, the Court (certainly not Defendant Citibank) should approve an

15 independent, third-party administrator—of which there are several available,

16 e.g., Gilardi & Co. of San Rafael, CA, Rosenthal & Co. of Novato, CA and

17 Rust Consulting of Minneapolis, MN.

18 The conflicts are obvious. Citibank's interests do not coincide with the

19 interests of class members.

20 There is no good reason to allow the Defendant to also be the settlement

21 administrator. An independent administrator should be required; one neither

22 chosen nor controlled by Citibank.

23

24

25 ⁴ ¶ III H(1) at page 14 of Settlement Agreement:

26 "1. Settlement Administrator: The settlement will be administered in house by Citibank

27 or, at Citibank's **sole discretion**, by an independent third-party administrator **selected by**

28 **Citibank**. In the event Citibank elects to select a third-party administrator, the administrator

shall be subject to approval by Class Counsel, which shall not be unreasonably withheld.

The third-party administrator shall be paid from the Settlement Fund." (bold added)

**6. SETTLEMENT DOES NOT TAKE INTO ACCOUNT
RECENT NINTH CIRCUIT AUTHORITY WHICH
GREATLY STRENGTHENS CASE**

In the recently decided appeal in *Bateman v. American Multi-Cinema, Inc.*, __ F.3d __, 2010 U.S. App. LEXIS 19934 (9th Cir, Aug. 27, 2010), the Ninth Circuit, interpreting the Fair and Accurate Credit Transactions Act, reversed the Trial Court's denial of certification because the penalty sought was disproportionate to the alleged harm done by Defendant.

Bateman, supra, it is submitted, effectively removed the previously substantial (and often used) defense against class certification in consumer class actions where a statutory penalty exists.

This defense was evidently much in mind when the Settlement Agreement was written since it contains a rather obvious effort to eliminate statutory damages payable to class members (Please see ¶ F 4 in footnote below).⁵ However, in light of *Bateman*, supra, it is submitted this defense no longer exists and there is an excellent chance Citibank is liable for very substantial statutory penalties.

Under the Settlement Agreement, the class members give up their claims (including to statutory penalties) under the Truth in Lending Act (TILA) and under California's Song Beverly Credit Card Act of 1971 (Civil Code § 1747 et seq.) and similar statutes in other States.

The Settlement Agreement effectively limits the class members' claims to unfair competition claims which do not attract a statutory penalty, unlike claims

⁵ See Settlement Agreement, ¶ F 4 at page 11:

"Attribution of Statutory Damages: Plaintiff and Class Counsel, on behalf of all Settlement Class Members, agree that \$500,000 of the Settlement Amount shall consist, and constitute full payment, of statutory damages pursuant to 15 U.S.C. § 1640(a)(2)(B), such that no further statutory damages may be awarded against any Released Parties in any class action or series of class actions within the meaning of 15 U.S.C. § 1 640(a)(2)(B) and/or with respect to any Released Claims."

1 under TILA and the Song-Beverly Act which do provide such penalties.

2 It appears that viable claims for class wide civil penalties for violations of
3 TILA and the Song-Beverly Act are now available for what appears to be a very
4 large number of class members; although the proposed settlement does not
5 provide any such statutory payments to class members.

6 Perhaps fear of statutory penalties is one reason we are not provided any
7 real information on class size.

8
9 **7. AT LEAST ONE SUB-CLASS IS NEEDED**

10 The Settling Parties settlement treats all class members the same.
11 However, it appears that, following the Ninth Circuit's *Bateman* decision, supra,
12 there is an excellent claim for additional compensation for, e.g. Californians
13 and residents of other States which provide extra protection for credit card users
14 via civil penalties for violation of their respective State statutes.

15 Thus, at least one sub-class is needed, but, the Settling Parties agreement
16 makes no provision for any sub-class.

17
18 **8. PROPOSED SETTLEMENT ATTEMPTS TO PLACE**
19 **UNLAWFUL RESTRICTIONS ON OBJECTORS**

20 The Proposed Settlement attempts to place unlawful requirements on
21 objectors—contrary to Supreme Court authority. In *Devlin v. Scardelletti*
22 (2002) 536 U.S. 1, the Court held that objectors who appear at the fairness
23 hearing have the right to appeal approval of a proposed settlement. The *Devlin*
24 Court did not expand that requirement of appearing at the hearing to include
25 other requirements such as making written objections by any certain date prior
26 to the final approval hearing.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

I, the undersigned, am employed at the Law Offices of Howard Strong, Postal Box 570092, Tarzana, CA 91357-0092 in the County of Los Angeles.

On the date below, I served the foregoing document(s) described as:

Objections by C. Prada to Final Approval of Proposed Class Action Settlement

___ by placing true copies thereof enclosed in a sealed envelope or envelopes addressed as stated on the attached mailing list:

X by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

CLASS COUNSEL	DEFENSE COUNSEL
Barry L. Kramer Law Offices of Barry L. Kramer 12428 Promontory Road Los Angeles, California 90049	Julia B. Strickland Stroock & Stroock & Lavan LLP 2029 Century Park East, 16th Floor Los Angeles, CA 90067

BY PERSONAL SERVICE: ___ I delivered such envelope or envelopes by hand:

BY MAIL: X I deposited such envelope or envelopes in the United States mail at Los Angeles, California. The envelope or envelopes were mailed with first class postage thereon fully prepaid.

BY EXPRESS MAIL: ___ I deposited such envelope or envelopes in the United States mail at Los Angeles, California. The envelope or envelopes were mailed with Express Mail postage thereon fully prepaid and in an envelope provided by the United States Post Office for Express Mail service.

BY FAX:___ I faxed a copy of aforesaid document to Fax # at approximately on the date below.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Date: November 8, 2010

H. Strong: /s/ *Howard Strong*